STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON EDUCATION ASSOCIATION, Charging Party, v. COMPTON UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4245-E PERB Decision No. 1518 April 18, 2003

Appearances: California Teachers Association by Brenda E. Sutton-Wills, Attorney, for Compton Education Association; Jones & Matson by Urrea C. Jones, Jr., Attorney, for Compton Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Compton Unified School District (District) to an administrative law judge's (ALJ) proposed decision (attached) which found that the District violated the Educational Employment Relations Act (EERA) section 3543.5(a) and (b)[1] by

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

interfering with the right of employees to participate in the activities of employee organizations and by retaliating against an employee who participated in protected activities.

After reviewing the entire record in this case, including the proposed decision, the District's exceptions[2] and the Compton Education Association's (Association) response, the Board adopts the proposed decision of the ALJ as the decision of the Board itself as modified by the following discussion.

DISCUSSION

The ALJ determined that the District violated EERA by: (1) interfering with employee rights when Principal Alphonso Dimaano (Dimaano) ratified a threat by bargaining unit member Stacey Nickelberry (Nickelberry) to new teachers that they should immediately leave a union meeting; (2) interfering with employee rights when Dimaano asked bargaining unit member Gina Gatto (Gatto) to reveal the identity of persons attending the union meeting; and (3) retaliating against Gatto by removing her from the school leadership team when she refused to identify the person responsible for calling the union meeting.

The District excepts to a finding of a violation based on an agency relationship between Nickelberry and Dimaano attributable to the District on a ratification theory because the District was not put on notice by the complaint that an agency relationship was at issue. Even if an agency relationship was properly considered, the District argues that the ALJ erred in applying the standard of the National Labor Relations Board (NLRB) to find agency by ratification.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2] The District's request for oral argument is denied.

Unalleged Violation

A major contention of the District both before the ALJ and on appeal is whether the complaint allows the District to be charged with Nickelberry's conduct. The District contends the complaint failed to allege Nickelberry was an agent of the District and that it was not put on notice that agency was at issue in this case.

The allegation in the complaint was that Dimaano "instructed bargaining unit member Stacey Nickelberry to interrupt Charging Party's meeting and warn all new teachers and non-tenured teachers not to be influenced by Charging Party or else risk losing their jobs." We agree with the ALJ that the obvious implication of this allegation is that had Nickelberry carried out the alleged instruction, she would have been serving as an agent of Dimaano. We further agree that even if an agency allegation was not found in the words of the complaint, the matter meets the requirements for consideration as an unalleged violation. The Board noted in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe-Truckee) that:

> …unalleged violations may be entertained . . . when adequate notice and the opportunity to defend has been provided [to] the respondent, and where such acts are intimately related to the subject matter of the complaint, are part of the same course of conduct, have been fully litigated, and the parties have had the opportunity to examine and be cross examined on the issue.

The ALJ correctly found that agency is “not a subtle, hidden issue” in the dispute. It was addressed at the hearing; both parties presented evidence on the issue and cross-examined the witnesses of the other side about the question of agency. Both parties were instructed to brief the question of agency and did so. The record supports the ALJ's findings. We find that all the requirements set forth in Tahoe-Truckee for establishing an unalleged violation have been met and the agency question is properly before the Board.

Agency

The ALJ concluded that as the facts show Nickelberry was not a management or supervisory employee, she was not an actual agent of the District. The ALJ further concluded that the facts failed to establish her ostensible or apparent authority to act on behalf of the District when she entered the Association meeting and warned all new teachers to leave. We agree with the ALJ that it was not established that Nickleberry was an actual agent of the District.

Apparent authority may be found from manifestations by the employer that create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question. (Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal.App.3d 767, 781 [278 Cal.Rptr. 228] (Inglewood).) In Inglewood Unified School District (1990) PERB Decision No. 792, the Board adopted the approach of Member Gonzales in Antelope Valley Community College District (1979) PERB Decision No. 97. Therein, he observed:

> Governing boards are responsible for the overall direction of school districts, but day-to-day decisions and actions, which may directly affect the organizational rights of employees, are often made by subordinates without specific authorization or ratification by the governing board. It is reasonable that under some circumstances employees may perceive their employer as responsible for such decisions and actions, regardless of whether the governing board itself is directly involved. Under other circumstances, such a perception may be unreasonable, and it may thus be inappropriate to attribute these actions to the employer. The question is in what situations should the employer be held responsible for acts by subordinates which are unlawful under section 3543.5.

In Inglewood, the Board recognized the need for a cautious case-by-case approach to a determination of ostensible or apparent authority when considering an agency relationship

under EERA. The test is whether the perception of agency is reasonable under the circumstances.[3]

Following a finding that Nickleberry was not an agent of the District, the ALJ determined that the District adopted or ratified her actions. The ALJ followed the well established principal of labor law that where a party ratifies the conduct of another, that party adopting the conduct accepts responsibility for any unfair practice implicated by the conduct. (See Dowd v. International Longshoremen's Association, AFL-CIO (11th Cir. 1992) 975 D.2d 779 [141 LRRM 2489, 2494].)

We find nothing in Inglewood that supports the District's contention that the Board rejected this approach to employer responsibility. In Inglewood, the Board merely determined that ratification had not been established because it had not been demonstrated that the employer had knowledge of a lawsuit filed by a high school principal against the teachers association. Without such knowledge, there was no reason for the employer to disavow the suit. The court approved the Board's approach to ratification. (Inglewood.)

Here, Dimaano knew that Nickelberry attended the Association meeting and threatened new teachers that they should immediately leave. Knowing about this conduct, he not only failed to repudiate it, he called the room and interrupted the meeting. He summoned Gatto to his office. There he questioned her about the Association meeting and removed her from the

[3] This approach is consistent with that currently applied by the NLRB. The NLRB test is whether under all the circumstances, employees "would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management." (See Great American Products (1993) 312 NLRB 962 [145 LRRM 1150] and the cases cited therein.)

leadership team. Through his refusal to disavow Nicklelberry's actions and by his own actions, Dimaano ratified Nickelberry's threats and interfered with employee rights.[4]

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Compton Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening new teachers and warning them to leave meetings of the Compton Education Association (Association).

2 Asking teachers to reveal the identity of the person or persons who called an Association meeting.

3. Retaliating against any teacher who refused to answer any question about the identity of the person or persons who called an Association meeting.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, offer teacher Gina Gatto an opportunity to resume her service on the Walton Middle School leadership team and reinstate her to the leadership team if she desires it.

[4] The remaining exceptions raised by the District were properly considered and resolved by the ALJ. No further discussion is required here.

2. Within ten(10) workdays following the date this Decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Members Whitehead and Neima joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-4245-E, Compton Education Association v. Compton Unified School District, in which all parties had the right to participate, it has been found that the Compton Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b) by interfering with the right of employees to participate in the activities of employee organizations and by retaliating against an employee who participated in protected activities.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Threatening new teachers and warning them to leave meetings of the Compton Education Association (Association).

2. Asking teachers to reveal the identity of the person or persons who called an Association meeting.

3. Retaliating against any teacher who refused to answer any question about the identity of the person or persons who called an Association meeting.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

Within ten (10) workdays following the date this decision is no longer subject to appeal of the service, offer teacher Gina Gatto an opportunity to resume her service on the Walton Middle School leadership team and reinstate her to the leadership team if she desires it.

Dated: _____ COMPTON UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON EDUCATION ASSOCIATION, Charging Party, v. COMPTON UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4245-E PROPOSED DECISION (8/24/01)

Appearances: California Teachers Association by Brenda E. Sutton-Wills, Staff Counsel, for Compton Education Association; Jones & Matson by Urrea Jones and Marcos F. Hernandez, Attorneys, for Compton Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing teachers contends here that at the instigation of a school principal, a non-teaching unit member disrupted a union meeting by bursting into the room and warning all new teachers in attendance that they should leave immediately. The union contends that the principal then called one of the teachers in attendance to his office, questioned her about the meeting and removed her from a committee because she would not answer his questions. The school employer replies that the teacher who disrupted the meeting was acting entirely on her own and without the authority of the principal. The employer asserts further that the principal questioned the teacher in order to determine whether the union had secured proper authorization to use the school room for its meeting.

The Compton Education Association (Union) commenced this action on December 1, 2000, by filing an unfair practice charge against the Compton Unified School District (District). The Office of the General Counsel of the Public Employment Relations Board

(PERB or Board) followed on February 7, 2001, with a complaint against the District. The complaint alleges that on or about September 28, 2000, the District, acting through its agent Principal Alphonso Dimaano, instructed bargaining unit member Stacey Nickelberry to interrupt a Union meeting and warn all new teachers and non-tenured teachers not to be influenced by the Union or else risk losing their jobs. The complaint further alleges that Mr. Dimaano then interrogated unit member Gina Gatto about the identity of the person who organized the meeting. Finally, the complaint alleges, Mr. Dimaano threatened Ms. Gatto with loss of membership on the school leadership team. By these acts, the complaint alleges, the District violated Educational Employment Relations Act (EERA) section 3543.5(a) and (b).[1]

The District answered the complaint on March 1, 2001, denying any wrong-doing. A hearing was conducted in Los Angeles on May 30, 2001. After the filing of post-hearing briefs, the matter was submitted for decision on August 13, 2001.

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k) of the EERA. The Union is an employee organization as defined in section 3540.1(d) and at all times relevant has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's certificated employees. There was no collective bargaining

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides that:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

agreement in effect between the parties during the relevant period. The prior agreement had expired on June 30, 2000, and the successor agreement did not go into effect until sometime after February 23, 2001.

The events at issue took place at the District's Walton Middle School. At all times relevant, the principal at Walton was Alphonso Dimaano. Mr. Dimaano has been employed by the District for 32 years and has been at Walton since July of 2000.

During the relevant period, Stacey Nickelberry was a non-teaching member of the certificated bargaining unit. Ms. Nickelberry was employed as the Project Facilitator at Walton. In this position, she coordinated, implemented and evaluated specially funded programs designed to meet the particular needs of students at Walton. Mr. Dimaano testified that Ms. Nickelberry provided guidance to teachers in implementing the programs and assisted him in program evaluation. He said that from "time to time" Ms. Nickelberry provided "feedback" on how particular teachers are performing. Asked if he considered Ms. Nickelberrry's feedback in making teacher evaluations, Mr. Dimaano replied: "The decisions are made will be -- will be part of that." Alfonso Matta, the long-time Union representative at Walton, testified "all of the teachers assumed that she [Ms. Nickelberry] was like an administrator." He said she worked in an office "and we assumed that she was, in a way, part of the administration."

At all times relevant, Gina Gatto was a teacher of developmental reading to seventh and eighth grade students at Walton. At the time of the hearing, she had been a teacher for three years and four months and had been employed at Walton for two years. She was not a Union representative at Walton. Until the events at issue, she served on the school leadership team.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

The leadership team is composed of teachers, parents, school plant workers and others who are "stake holders" of the school. Ms. Walton had been requested to serve on the team by the principal who preceded Mr. Dimaano. She testified that when she was on the team she spent two hours every week to plan curriculum and other activities to improve student achievement. She described the activities of the team as "obviously something that's quite worth while."

On September 28, 2000, an after-school meeting of Walton teachers was scheduled by someone involved in the Union. The identity of the person who arranged for the meeting was not disclosed at the hearing but it is clear that the meeting was conducted under the aegis of the Union. Thomas Hollister, executive director of the Compton Education Association, CTA/NEA, testified that he was called by a Union faculty representative at Walton and told that the teachers wanted to have a Union meeting and that they wanted him to attend.

Mr. Hollister said the purpose of the meeting "was to discuss some issues that they had, one of them being banked time,[2] and a number of other issues." Ms. Gatto testified that "[t]here was a general concern . . . about the principal . . . and all the teachers knew it, and all the plant staff knew it, and everybody knew it, that we were having concerns about this principal." This knowledge was so widespread, Ms. Gatto testified, that Ms. Nickelberry almost certainly would have known that is why the teachers were getting together.

The meeting was held in a classroom at Walton, beginning at about 3:30 p.m., a time after the conclusion of the teacher workday. Ms. Gatto testified that as teachers were coming into the room, Ms. Nickelberry entered and addressed the group. Ms. Gatto testified that Ms. Nickelberry looked around the room and stated that "anyone that does not have a credential, is not already credentialed or has -- is on [an] emergency [credential], that they

[2]Mr. Hollister did not explain what was encompassed by "banked time."

need to leave the meeting." Ms. Gatto testified that she interrupted Ms. Nickelberry and asked "are you kidding?" Ms. Gatto testified that Ms. Nickelberry then "put her hand up and she said, 'I'm not talking to you,' and she said, '[all you] new teachers need to get up,' and she used her finger and waved it and, [said] 'get out now.'" Ms. Gatto said that in making the comment Ms. Nickelberry "waved sort of over to that side of the room where there were some new teachers sitting, so I guess about three of them came up from that table, but they came from everywhere." Ms. Gatto estimated that "at least five" of the new teachers left the room, accompanied by Ms. Nickelberry.

Mr. Matta, who also witnessed the incident, offered a similar description of Ms. Nickelberry's actions. Mr. Matta testified:

> . . . Ms. Nickelberrry came to the door opening and kind of looked around at first, and she said something to the fact that if there are any non-credentialized [sic] or non-something-or-other of teachers that didn't have a contract, non-signed-contract, because a lot of them were temporary, and you're at the meeting, if you know what's good for you, you better leave now. And there were a lot of new teachers there.
>
> . . . . . .
>
> They had a very startled look on their face[s] and they left.

Union Executive Director Hollister arrived at the meeting within 5 minutes after the incident with Ms. Nickelberry. He said several teachers were walking away from the room just as he arrived. In the room, he testified, he found the remaining teachers angry and frustrated. He said several told him that some of the teachers in attendance had been threatened into leaving by Ms. Nickelberry. He said the teachers remaining in the meeting expressed a view that the interruption "was coming from Mr. Dimaano, through Ms. Nickelberry." He said the teachers asked him, "can they do that?" He replied that teachers had a protected right to meet.

However, he continued, "the new teachers had already left the room and we didn't attempt to go back and get them."

Mr. Dimaano testified that he had not known about the teacher meeting until Ms. Nickelberry told him about it. He said that Ms. Nickelberry came into the office and told him "there was some meeting going on in Ms. Gatto's room." He continued:

> Ms. Nickelberry told me that there were teachers there, and that she said to the group -- I don't know who were there -- that if you're temporary contract teachers, you better not be in this meeting, and that's all I can remember.

Mr. Dimaano said that Ms. Nickelberry was not acting on his orders, or under his authority, when she went to the room where the meeting was underway. He said he did not remember whether he had a subsequent discussion with Ms. Nickelberry about the propriety of her action. Asked if he took any steps to ensure that teachers did not think Ms. Nickelberry was acting under his authority, Ms. Dimaano replied: "No, I didn't. I couldn't." He said he couldn't have taken any action "because Ms. Nickelberry is part of the group or, you know, she's there, you know, and she's speaking on her own."

After Ms. Nickelberry told him about the meeting, Mr. Dimaano testified, he "right at that time" called Ms. Gatto at the classroom where the meeting was taking place. He said he called Ms. Gatto because "I thought I was entitled to knowing [sic] what's going on in the campus, as principal."

Ms. Gatto testified that Mr. Dimaano called twice to the room where the meeting was taking place and asked to speak to her. The first time, she testified, she told him "that I was in a union meeting." She said he called again and told her "I absolutely had to come down to his office, that he needed to speak to me." She said that he was standing behind his desk when she arrived. She continued:

> . . . and I said, what do you need right now, I'm in a meeting, and he said, "what meeting, who called a meeting?" And I said, well, I didn't call a union meeting, . . .

Ms. Gatto said the principal again asked, "who called the union?" By this time, Ms. Gatto testified, she said she got the impression that Mr. Dimaano believed she had called the meeting. She said she again told him that she had not. She quoted Mr. Dimaano as then stating:

> . . . "well, if you cannot support me, Ms. Gatto," and that is exactly what he said, "if you cannot support me, Ms. Gatto, then I cannot have you on the leadership team."

Ms. Gatto testified that she interrupted him by stating ,"I can support the school."

Upon being told that she would be removed from the leadership team, Ms. Gatto testified, she removed herself from the position of seventh grade chair. She testified:

> . . . And I said, well, if you don't want me on the leadership team, then I won't be seventh grade chair either, because I was also the seventh grade chair. And he said -- questioned that, and I said, well, I -- I said, if I'm not on the leadership team, then I'm not the seventh grade chair, either, do you need it in writing. And he said, no, he did not need it in writing.

Ms. Gatto's testimony was corroborated in substantial part by Mr. Hollister who testified that he was in the room when the phone rang. He said the phone rang twice and he did not know who called the first time. The second time, he testified,

> . . . Ms. Gatto was called to the phone, told it was for her, and when she got to the phone she indicated that it was Mr. Dimaano on the end, the principal of Walton Middle School, and we could hear her talking. Everybody stopped talking so that we could listen in. And we could hear her say that she was at a meeting here and that -- and then when she hung up, she turned to the people there and said, "I have to go to the office, Mr. Dimaano said he needs to see me right away," and so she left the room and came back probably about ten minutes later, and was very upset, said that Mr. Dimaano had asked her who was at the meeting. She refused to answer that question and she said that he then asked her who called the meeting. She would not give him that

> information, either, and so he told her that if she couldn't give that kind of information and [be] cooperative with him in that way, that she had no business being on his leadership team, and so she indicated that she was no longer on the leadership team.

Mr. Dimaano testified that he could not remember whether his conversation with Ms. Gatto that day was on the telephone or if she came to his office. He described his conversation with Ms. Gatto as follows:

> I asked her what is going on and she said, "I don't know." I believe I asked the question -- I can't even remember what, you know, what is going on and she says "I don't know," and that's as far as, you know, I can remember what went on.

Mr. Dimaano said there was no discussion about Ms. Gatto's assignment as department chair. He said he could not recall any other statements that were made by him or Ms. Gatto. Asked if he asked Ms. Gatto who called the meeting, he testified, "I don't remember." Asked if he asked Ms. Gatto who attended the meeting, he said, "No." Asked if he said anything to Ms. Gatto about backing or supporting him, he said, "No." Asked if he discussed the leadership team with Ms. Gatto, Mr. Dimaano said, "No." He said, "I don't remember what else transpired, really." Asked if he remembered how the conversation ended, he replied: "No, I don't remember how it ended."

Mr. Dimaano testified that Ms. Gatto removed herself from the leadership team in November or December of 2000. Asked how this came about, Mr. Dimaano said: "[O]ne day she came to me with a note saying that [she was] resigning from, you know, [the] leadership team." He said there was no discussion about it. "I just accepted the resignation." Asked if Ms. Gatto gave him any explanation when she resigned from the leadership team, Mr. Dimaano replied, "No, she didn't." Asked if he had a copy of the note that Ms. Gatto gave him when she resigned from the leadership team, Mr. Dimaano said, "If I could find it, I probably would have it." He said he "usually" saves that type of thing. Regarding how

Ms. Gatto came to leave the position as seventh grade chair, Mr. Dimaano testified, "I just remember vaguely that she said she doesn't want to do it anymore, . . . "

The District urges that this credibility dispute be resolved in favor of Mr. Dimaano. Citing portions of the transcript, the District argues that Ms. Gatto acknowledged that she did not recall exactly what Mr. Dimaano had asked her or his exact words and that she was testifying only to the general context of the conversation. The District argues that because of this uncertainty the Union has failed to establish by a preponderance of the evidence that Mr. Dimaano threatened Ms. Gatto with loss of membership on the school leadership team.

The District's assertion is based in part on the following question counsel for the District asked Ms. Gatto during the hearing:

> Now, let's – let's go to the – the meeting with the principal. Do you recall exactly what questions he asked you? Yes or no?

In response to this question, Ms. Gatto said, "No," an answer I do not find surprising. There are very few people who could recall the exact words spoken in a conversation that occurred some months earlier. However, Ms. Gatto did clearly remember the essential elements of the conversation and summarized it on several occasions during her testimony.

Although the District's characterization makes Ms. Gatto's testimony appear hesitant and uncertain and therefore unreliable, I found her testimony to be quite the opposite. I found Ms. Gatto to be a forthright and animated witness who expressed a clear recollection of what occurred at the meeting of September 28, 2000. I resolve the credibility dispute in favor of her version of the meeting. On the witness stand, Ms. Gatto testified to some of the specific words spoken by Mr. Dimaano and demonstrated a good recollection of what he said and what she said. She articulated a believable relationship between how she came to leave both the leadership team and her position as seventh grade chair at the same time.

Ms. Gatto's testimony about these events was consistent, moreover, with what she stated to others only minutes after her meeting with Mr. Dimaano. Mr. Hollister confirmed that Ms. Gatto received a telephone call during the meeting and that while she was on the phone she indicated that it was Mr. Dimaano on the other end of the line. Mr. Hollister confirmed that Ms. Gatto left the room and returned ten minutes later, highly upset. Mr. Hollister's testimony about what Ms. Gatto stated upon returning from the meeting was consistent in all essential detail with the version of the incident related by Ms. Gatto on the witness stand. This includes Ms. Gatto's version of how she was separated from her positions on the leadership team and as seventh grade chair.

I was totally unconvinced by Mr. Dimaano's stated inability to remember the details of his September 28 conversation with Ms. Gatto. He could remember hardly anything about the conversation, from where it occurred to how it concluded. He testified that Ms. Gatto removed herself from the leadership team by giving him a written memo, yet he did not produce the memo at the hearing even though acknowledging that he normally keeps such memoranda. He testified that he had no conversation at all with Ms. Gatto about her reasons for allegedly resigning from the leadership team. Given the prominence that the leadership team was accorded by the parties at Walton, I find it highly doubtful that he would not inquire why a teacher had resigned, if in fact she had resigned. I also discount his stated inability to recall any of the details of Ms. Gatto's supposed resignation from her position as seventh grade chair. I also find it highly improbable that Mr. Dimaano would call Ms. Gatto to his office simply to ask her what was going on and then drop the matter with that single question when she stated that she did not know. Such behavior would be inconsistent with the urgency he attached to his inquiry, by calling Ms. Gatto "right away," as soon as he learned of the teacher meeting from Ms. Nickelberry.

Accordingly, I find that Mr. Dimaano did call Ms. Gatto to a meeting in his office on September 28, 2000. I find that he did ask her who called the meeting of teachers then underway in a school classroom and that he did ask her who was in attendance at the meeting. I find that when Ms. Gatto answered that she did not know who called the meeting and declined to tell him who was in attendance, Mr. Dimaano then told Ms. Gatto that if she could not support him she could not continue as a member of the school leadership team. I find that Ms. Gatto reasonably interpreted this comment as a statement that Mr. Dimaano was removing her from the leadership team. I find that she thereupon resigned from her position as seventh grade chair.

The contract in existence between the parties from July 1, 1997, through June 30, 2000, allowed use of school facilities for Union meetings. In Section 5.3, the agreement provides:

> The Association may conduct Association business on district property outside of established hours when the Association has obtained in advance a "Use of Facilities" permit from the District.

No Union witness at the hearing had secured a Use of Facilities permit to use a classroom at Walton Middle School for the meeting on September 28, 2000. No witness had knowledge of actions by any Union representative to secure a permit for the meeting of September 28, 2000. Mr. Matta testified that he had scheduled Union meetings for 15 years at Walton and had never secured a permit or sought permission in advance. Mr. Hollister testified that so far as he knows the Union has no practice of securing permits in advance to use District facilities for meetings of teachers at a single school. He said permits are secured only for meetings that involve all of the teachers in the District.

LEGAL ISSUES

1. Did the District interfere with the rights of employees to participate in activities of an employee organization when, on September 28, 2000, Stacey Nickelberry warned new teachers that they should leave a Union meeting at Walton Middle School?

2. Did the District interfere with the rights of employees to participate in the activities of an employee organization when, on September 28, 2000, Alphonso Dimaano interrogated Gina Gatto about the Union meeting at Walton Middle School?

3. Did the District interfere with the rights of Gina Gatto to participate in the activities of an employee organization when, on September 28, 2000, Alphonso Dimaano removed her from the leadership team at Walton Middle School?

CONCLUSIONS OF LAW

Agency

The Union argues that Ms. Nickelberry, although a member of the bargaining unit, was acting as an agent for Mr. Dimaano when on September 28, 2000, she warned new teachers that they should leave the Union meeting. The Union argues that even if Ms. Nickelberry acted on her own initiative, she was emboldened by the day-to-day authority granted to her by Mr. Dimaano. The Union asserts that Ms. Nickelberry instructs and directs unit members as part of her duties as project coordinator. As a result, the Union asserts, she was acting with apparent authority when she ordered the new teachers out of the meeting. Moreover, the Union continues, Principal Dimaano approved and ratified Ms. Nickelberry's conduct. The Union observes that Ms. Nickelberry told Mr. Dimaano what she had done as soon as she left the meeting. Mr. Dimaano then called Ms. Gatto's classroom and demanded that she report to him, actions which the Union characterizes as demonstrating approval for Ms. Nickelberry's conduct. Then, the Union concludes, Mr. Dimaano reinforced the perception of

Ms. Nickelberry's authority by warning Ms. Gatto about the consequences of her refusal to answer his questions.

The District rejects this interpretation, arguing first that the complaint fails to allege that Ms. Nickelberry was an agent of the District and, because there was no motion to amend the complaint to add this allegation, agency cannot be considered. Alternatively, the District continues, even if agency is properly before the Board, the Union has failed to establish it. The District argues that there was no showing of actual agency. At most, the District asserts, the Union has shown that its members "assumed" that Ms. Nickelberry was a part of the administration. However, the District continues, mere surmise as to the authority of a supposed agent is insufficient to impose liability on the principal.

Moreover, the District continues, there is no evidence that would establish that Ms. Nickelberry acted with ostensible or apparent authority. "Charging Party has not established by a preponderance of the evidence that the District represented to anyone that Ms. Nickelberry was its agent, that the Charging Party relied on any such representation, or that Charging Party changed its position in reliance on any such representation," the District argues. Finally, the District asserts, there was insufficient evidence to establish that the District ratified any action of Ms. Nickelberry. In fact, the District concludes, Ms. Gatto herself testified to a personal belief that Ms. Nickelberry was acting entirely on her own when she went into the teacher meeting on September 28, 2000.

Whether Ms. Nickelberry's disruption of the September 28 Union meeting can be charged to the District is the critical first question in this case. The District is responsible for Ms. Nickelberry's conduct only if she was an actual agent of the District, or she acted under apparent authority from the District, or, even in the absence of agency, the District ratified and thereby adopted her conduct. This question, I conclude, was clearly placed at issue by the

allegation in the complaint that Mr. Dimaano "instructed bargaining unit member Stacey Nickelberry to interrupt Charging Party's meeting and warn all new teachers and non-tenured teachers not to be influenced by Charging Party else risk losing their jobs." The obvious implication of this allegation is that Ms. Nickelberry, had she carried out the alleged instruction, would have been serving as an agent of Mr. Dimaano. It is self-evident that a person who acts at the specific instruction of another is an agent of the party who gave the instruction.

But even if an agency allegation were not found within the words of the complaint, it is apparent that the matter meets the requirements for consideration as an unalleged violation. "[U]nalleged violations may be entertained . . . when adequate notice and the opportunity to defend has been provided [to] the respondent, and where such acts are intimately related to the subject matter of the complaint, are part of the same course of conduct, have been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue." (See Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe Truckee).) "The failure to meet any of the above-listed requirements will prevent the Board from considering unalleged conduct as violative of the Act." (Ibid. See also, Cajon Valley Unified School District (1995) PERB Decision No. 1085 and Hacienda La Puente Unified School District (1997) PERB Decision No. 1187.)

Agency is not a subtle, hidden issue in this dispute and it was addressed at the hearing. Both parties presented evidence about agency, a question which is so interwoven with the charge against the District as to be part of the same fabric. It is clear that if the District cannot be held responsible for Ms. Nickelberry's comments at the teachers' meeting, there is no unfair practice. Both parties understood this, presented testimony on the question and cross-examined the witnesses of the other side about the question of agency. Both parties were

instructed[3] to brief the question of agency and they both did so. Plainly, the agency question has been litigated. All requirements set out in Tahoe-Truckee for establishing an unalleged violation have been met and the agency question is properly before the Board.

The PERB's first comprehensive analysis of an agency question arose in Antelope Valley Community College District (1979) PERB Decision No. 97 (Antelope Valley). In Antelope Valley, as was noted in a subsequent Board decision,[4] the two members participating agreed only on the result and not on the rationale. One Board member (Gluck) wanted to adopt the agency rules consistently applied in private sector labor relations cases. This would have included wholesale adoption of the private sector rule that an employer is responsible for the acts of employees acting with the apparent authority of the employer. Noting textual differences between the EERA and federal law, the other member (Gonzales) was of the view that assertions of apparent authority should be decided on a case by case basis depending upon whether under the circumstances the perception was reasonable.

The Board next considered an agency question in Compton Community College District (1987) PERB Decision No. 649. There the Board affirmed the dismissal of an unfair practice charge because the factual allegations were insufficient to set out a prima facie case of agency. The two-member majority concluded that in cases where the principal actor is not alleged to have been a supervisory or managerial employee:

> . . . some factual demonstration of a relationship beyond employment alone is necessary to impute or infer an agency relationship. [Citation.] For an agency relationship to exist [the union] must allege facts which show that [the principal actor] was acting with some direction, instigation, approval or ratification of the action by the [d]istrict. [Citation.]

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[3]See Reporter's Transcript, Volume 1, at p. 71.

[4]Inglewood Unified School District (1990) PERB Decision No. 792 (Inglewood).

This rule was augmented in Inglewood, the decision which sets out PERB's current approach to agency questions. In Inglewood, the Board held that a school principal was not the agent of a public school employer when he filed a lawsuit against certain teachers because of their activities on behalf of a union. Even though as a management employee the principal was an actual agent of the employer, the Board concluded that he had no express authorization to file the lawsuit and that in filing the lawsuit he had acted outside the scope of his authority.

The Board then turned to the question of whether in filing the lawsuit the school principal acted with ostensible authority. The Board held that:

> . . . To prove ostensible or apparent authority, the Association was bound to establish representation by the principal (the District) of the agency, justifiable reliance by the party seeking to impose liability on the principal (the teachers); and a change in position resulting from that reliance.

The Board concluded that the charging party did not prove that the public school employer had made any representation that the lawsuit was filed on the school district's behalf or that the union had detrimentally relied on any such representation. Accordingly, the Board concluded that the school principal did not act with ostensible authority when he filed the lawsuit against the union leaders.

Finally, the Board considered the question of whether the school employer had "condoned or ratified the filing of the lawsuit" thereby incurring liability even though the school principal was not acting as an agent at the time he filed the lawsuit. Again, the Board found the evidence insufficient to establish that the school employer was responsible for the principal's action. The Board concluded that the union had failed to prove that the school employer had knowledge that the school principal had filed the lawsuit. Absent knowledge, the Board concluded, the school employer's silence about the filing of the lawsuit could not be interpreted as ratification. "Since we do not find that the Association proved that the

District . . . had any knowledge of the filing of the lawsuit, we do not find that any duty arose on the part of the District to disavow the lawsuit," the Board concluded.[5]

Ms. Nickelberry's position as Project Facilitator has never been designated as management or supervisory by the District and all witnesses expressed the belief that she was a member of the bargaining unit represented by the Union. There was evidence that Ms. Nickelberry had provided Mr. Dimaano with some limited amount of information which he used in some unclear manner in making teacher evaluations. However, this evidence was sketchy and far too vague to justify a conclusion that Ms. Nickelberry actually performed the duties of a supervisor.[6] Because there is no basis for finding that Ms. Nickelberry was a management or supervisory employee, I conclude that she was not an actual agent of the District.

I conclude, further, that the Union has failed to establish that Ms. Nickelberry acted with ostensible or apparent authority when she burst into the teacher meeting and warned all new teachers to leave. The only evidence on this point was Mr. Matta's testimony that because Ms. Nickelberry did not teach and worked in the administrative office that teachers "assumed that she was, in a way, part of the administration." However, there is no evidence that Mr. Dimaano ever made any representation that Ms. Nickelberry was part of the administration, or that he had told teachers that she had the authority to act on his behalf or in

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[5]The Board's conclusions were upheld in Inglewood Teachers Association v. Public Employment Relations Board (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].

[6]"Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Sec. 3540.1(m).)

his absence. Evidence that she does not teach and that her office is located in the administrative wing of the school is not sufficient to demonstrate that Ms. Nickelberry had the power to act on behalf of the District in matters affecting the teacher bargaining unit.

That leaves, finally, the question of whether the District adopted or ratified the actions of Ms. Nickelberry when she warned new teachers to leave the meeting. It is a well-established principle of labor law that where a party ratifies the conduct of another, that party by adopting the conduct accepts responsibility for any unfair practice implicated by the conduct. In a federal case involving a challenge to the conduct of a union, a federal court summarized the rule as follows:

> NLRB decisions clearly teach that where a union affirms prior conduct performed on its behalf, the union may be responsible for the unfair labor practices of another even where the conduct did not bind the union at the time it occurred. [Dowd v. International Longshoremen's Association, AFL-CIO (11th Cir. 1992) 975 F.2d 779 (141 LRRM 2489, 2494).]

For the purpose of determining whether there was ratification, the District will be charged with the actions of Ms. Nickelberry if Mr. Dimaano adopted them. As principal of Walton Middle School, Mr. Dimaano was an actual agent of the District. Supervising teachers, including questioning them or warning them, would be within the scope of his authority to manage the school. If he adopted or ratified Ms. Nickelberry's warning to teachers as his own, his endorsement of her conduct would constitute an assumption of responsibility by the District. That such conduct might be an unfair practice would not remove it from the scope of Mr. Dimaano's authority.

In order to establish ratification, the charging party first must show that the party it seeks to charge with the wrongful act had knowledge of the conduct it is accused of adopting. A party's silence cannot be interpreted as adoption where that party has no knowledge of the

act in question. (Inglewood.) Here, it is undisputed that Mr. Dimaano had knowledge of what Ms. Nickelberry said when she entered the room full of teachers. He testified that Ms. Nickelberry told him that she had stated to the group "that if you're temporary contract teachers, you better not be in this meeting."

Possessing this knowledge, Mr. Dimaano did not repudiate the comment. He said nothing to teachers that would indicate in any way that he disagreed with Ms. Nickelberry's assertion that new teachers should not participate in the meeting in Ms. Gatto's classroom. Indeed, Mr. Dimaano's next actions suggested exactly the opposite, i.e., that he agreed with Ms. Nickelberry. Mr. Dimaano "right at that time" called the classroom where the meeting was underway. In the second of two conversations, he demanded that Ms. Gatto come immediately to the office. All teachers remaining in the room knew it was Mr. Dimaano on the phone. When Ms. Gatto arrived at his office, Mr. Dimaano questioned her about the meeting. Dissatisfied with her answers, he removed her from the leadership team. Ms. Gatto returned to the classroom and reported these events to the teachers present.

By his failure to repudiate Ms. Nickelberry's warning to new teachers and by his subsequent actions toward Ms. Gatto, Mr. Dimaano demonstrated approval of the conduct of Ms. Nickelberry. Indeed, Mr. Dimaano's own conduct toward Ms. Gatto expressed more forcefully than with words a clear belief that there was something improper about the meeting of teachers. In the context of these events, teachers attending the meeting could reasonably believe that Ms. Nickelberry's comments had the full support of Mr. Dimaano. I conclude that both by his silence and by his own acts, Mr. Dimaano ratified Ms. Nickelberry's warning to new teachers. Her conduct is therefore chargeable to the District and if it constitutes an unfair practice, the District is liable for it.

Alleged Interference

There are three incidents of alleged interference at issue: Ms. Nickelberry's warning to the new teachers, Mr. Dimaano's questioning of Ms. Gatto, and Mr. Dimaano's removal of Ms. Gatto from her position on the leadership team at Walton Middle School.

Public school employees have the protected right

> . . . to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . . [7]

It is an unfair practice under section 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad).)[8] In an

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[7]Section 3543.

[8]The Carlsbad test for interference provides, in relevant part, as follows:

> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

interference case, it is not necessary for the charging party to show that the respondent acted with an unlawful motivation. (Regents of the University of California (1983) PERB Decision No. 305-H.)

The Union argues that it "is axiomatic that attending an Association meeting is protected activity under EERA." The Union observes that attending a Union meeting is participation in the activities of an employee organization and that under Carlsbad these rights "are vested without patent condition." Anticipating the District's argument, the Union argues that Ms. Nickelberry's action cannot be excused by the failure of the Union to secure advance permission to use the classroom for a meeting. The Union asserts that it has never been the practice that permission was needed for school site meetings after school hours. Moreover, the Union contends, by addressing her comments solely to the new teachers Ms. Nickelberry revealed a purpose of discouraging new teachers from participating in Union activities, not a concern about the Union's failure to make proper arrangements.

Because the District rejects the idea that it is in any way responsible for the conduct of Ms. Nickelberry, it does not specifically address the question of whether comments to the new teachers could constitute interference with protected conduct. If there was an interference, the District observes, it was Ms. Nickelberry who violated the charging party's rights, not the District.

It is self-evident that attending a Union meeting is a protected activity. Indeed, attending a union meeting is participating in the activities of an employee organization at its most basic level. It is well established, moreover, that the right to participate in the activities

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5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

of an employee organization extends to probationary teachers as well as to tenured teachers. (McFarland Unified School District (1990) PERB Decision No. 786, affirmed in McFarland Unified School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405].) It is no less an unfair practice for a public school employer to interfere with the rights of newly hired teachers than it is to interfere with the rights of long-time employees.

The District makes no argument that those who were warned to leave the Union meeting were somehow not public school employees.[9] Union witnesses identified them as new teachers at Walton. As such, they fit easily within the statutory definition as persons "employed by [a] public school employer." The statutory language makes no reference to credential status as the mark of being an "employee." The right to participate in the activities of an employee organization exists regardless of whether an employee has a permanent credential or a temporary credential, is on a short-term contract or a long-term contract. I conclude, therefore, that the teachers who were directed by Ms. Nickelberry to leave the Union meeting were public school employees, entitled to the rights granted by section 3543.

All versions of what Ms. Nickelberry stated to the new teachers can reasonably be interpreted as a threat. Ms. Gatto testified that Ms. Nickelberry stated that the new teachers "need to leave the meeting." Mr. Matta testified that Ms. Nickelberry told the new teachers that "if you know what's good for you, you better leave now." Mr. Dimaano testified that

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[9]Under section 3540.1(j):

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

Ms. Nickelberry told him that she told the new teachers that they "better not be in this meeting."

Such words are a clear warning of an adverse consequence for failure to leave the meeting. Although the nature of the adverse consequence was not described, such statements may reasonably be interpreted as a warning that something bad might happen to any newly hired teacher who chose to remain in the meeting. This was made especially clear when Ms. Nickelberry accompanied her words with a hand gesture directing the new teachers to the door. Newly hired teachers, not tenured and perhaps working on temporary or emergency credentials, are more vulnerable than established, tenured teachers. It would be reasonable for a new teacher to feel threatened by Ms. Nickelberry's words, even though a tenured teacher might shrug off such a comment. A non-tenured teacher might reasonably consider the possible consequence of ignoring Ms. Nickelberry's warning as too great to ignore. Prudence dictated that they leave, and they all did.

Section 3543.5(a) specifically makes it an unfair practice for a public school employer to "threaten to impose reprisals" on employees for engaging in protected conduct. Absent a showing of a valid purpose by the employer, a threat of reprisal is an unfair practice. (Regents of the University of California (1998) PERB Decision No. 1263-H at p. 44 of administrative law judge opinion; Regents of the University of California (1983) PERB Decision No. 366-H.) Here, newly hired employees were warned to leave a Union meeting. Warning employees that they should not attend a union meeting is conduct that is inherently destructive of employee rights. Under Carlsbad the District's conduct can be excused only on proof that "it was occasioned by circumstances beyond the employer's control and no alternative course of action was available." There is no showing here that it was beyond Mr. Dimaano's control to

repudiate Ms. Nickelberry's warning to the new teachers and, by his silence and his conduct toward Ms. Gatto, thereby adopt Ms. Nickelberry's conduct as his own and that of the District.

Indeed, the District has offered no evidence that would satisfy even the lesser standard of demonstrating operational necessity. I am not convinced by the District's assertion that the problem with the meeting was that the Union leaders had failed to secure advance permission to use the classroom as required by the contract. Union witnesses testified without contradiction that they had never been required to obtain permission prior to using a classroom for an after school meeting at Walton Middle School.

More importantly, it is clear that Ms. Nickelberry's comments were not related to the failure of the Union to secure advance permission to use the classroom. Had this been her motivation, she would have told all teachers in attendance that they should leave the meeting and would not have focused entirely on newly hired teachers. By focusing on newly hired teachers, Ms. Nickelberry revealed a purpose of reducing the number of teachers who might join in any common course of action that might be decided upon by those attending the meeting.

Accordingly, I conclude that the District interfered with the rights of new teachers to participate in the activities of employee organizations by the action of Mr. Dimaano in ratifying the conduct of Ms. Nickelberry. Such an interference is a violation of section 3543.5(a). By discouraging employees from participating in the activities of the Union, the District also interfered with the ability of the Union to represent its members. When employees are intimidated not to participate in Union activities, the collective strength of the Union is weakened, thereby interfering with its ability to represent its members. For this reason, I find also that the ratification of Ms. Nickelberry's warning to the new teachers also violated section 3543.5(b).

The next issue presented by the facts here is whether Mr. Dimaano's questioning of Ms. Gatto constituted an interference with the protected right to participate in protected activities in violation of section 3543.5(a). The Union characterizes Mr. Dimanno's questioning of Ms. Gatto as "calculatingly threatening and coercive." The Union notes that the principal called her out of a Union meeting and demanded to know who called the meeting. He then threatened her about the consequences of her failure to answer his questions. "This was not a reasonable conversation," the Union observes and therefore violates the EERA.

The District contends that Mr. Dimaano had the right under the contract between the parties to inquire about what was "going on" in the classroom. The District observes that under the contract the Union is obligated to obtain advance permission from the site administrator to conduct a meeting on school premises. Therefore, the District contends, Mr. Dimaano was acting within the District's rights when he questioned Ms. Gatto.

Interrogation of an employee by a manager or supervisor will be an interference with protected rights if, under the circumstances, the interrogation of the employee was coercive. (Clovis Unified School District (1984) PERB Decision No. 389 (Clovis) adopting Blue Flash Express, Inc. (1954) 109 NLRB 591 [34 LRRM 1384].) "The specific words used are not determinative where the inquiry conveys employer disapproval toward the union and creates an expectation of employee response." (Clovis.) Where the interrogation causes at least slight harm to employee rights, the employer will be excused if it can show operational necessity and a balancing of the competing interests weighs in favor of the employer. (Carlsbad.)

I have credited Ms. Gatto's version of the September 28, 2000, conversation between herself and Mr. Dimaano as the accurate description of what took place in that meeting. The record thus establishes that Mr. Dimaano twice asked Ms. Gatto who called the meeting of teachers. When Ms. Gatto refused to answer the question, Mr. Dimaano told her that "if you

cannot support me, Ms. Gatto, then I cannot have you on the leadership team." Pressing an employee to reveal who called a Union meeting and then removing her from an assignment considered prestigious at the work place is clearly an action that "conveys employer disapproval toward the union and creates an expectation of employee response." (Clovis.) Such an interrogation causes at least slight harm to employee rights. It was an investigatory question and it implied that calling a Union meeting was somehow an improper activity.

The District justifies Mr. Dimaano's questioning on the ground that as principal he had a right to know what was going on at the school. The Union had failed to properly secure advance approval for the use of a classroom and, the District reasons, Mr. Dimaano would have been derelict in his duty if he had not inquired into what was going on. The District reasons that the principal's right to know what was going on in his school clearly outweighs the brief intrusion on Ms. Gatto's participation in the Union meeting.

I find the District's argument unpersuasive. If Mr. Dimaano had been interested in finding out why the Union did not make advance arrangements for the use of the classroom one would expect him to have called the Union representative to his office. The Union's site representative, Mr. Matta, was in the classroom. There is no evidence that Mr. Dimaano asked to speak to him. Nor is there evidence that Mr. Dimaano subsequently asked Mr. Hollister, executive director of the Union, for an explanation of the Union's apparent failure to adhere to the requirements of the contract. Instead, Mr. Dimaano called to his office Ms. Gatto, a teacher with no official position in the Union. When Ms. Gatto arrived at his office, Mr. Dimaano did not ask her whether she knew if the Union had made arrangements for use of the classroom prior to calling the meeting. He asked her who called the meeting, a question pregnant with the suggestion that whoever called the meeting had engaged in some wrong-doing.

The nature of Mr. Dimaano's questions and his target for questioning convince me that his purpose was not to find out why the Union neglected to reserve a room prior to calling a Union meeting. For this reason, I find the District's assertion of operational justification to be unpersuasive. Accordingly, I conclude that the District interfered with the rights of Ms. Gatto to participate in the activities of an employee organization by the action of Mr. Dimaano in calling her to the office on September 28, 2001, and questioning her about the Union meeting. Such an interference is a violation of section 3543.5(a). Because Mr. Dimaano's questioning of Ms. Gatto would have the natural effect of discouraging her from participating in the activities of the Union, this action also interfered with the ability of the Union to represent its members. When employees are intimidated not to participate in Union activities, the collective strength of the Union is weakened, thereby interfering with its ability to represent its members. For this reason, I find also that Mr. Dimaano's conduct violated section 3543.5(b).

Alleged Discrimination

The final issue here is whether Mr. Dimaano committed an unfair practice when he removed Ms. Gatto from the Walton Intermediate School leadership team. The charge and the complaint allege that Mr. Dimaano "threatened" to remove Ms. Gatto from the leadership team if she failed to answer his question about who called the teacher meeting. As a threat, Mr. Dimaano's action was alleged to have been an interference with Ms. Gatto's protected rights. However, I have credited Ms. Gatto's testimony that at the meeting Mr. Dimaano removed her from the leadership team because she would not answer his question. Removal of Ms. Gatto from the leadership team was not a threat; it was a completed act. As such, the Union observes in its brief, the Mr. Dimaano's action should be analyzed as an unlawful retaliation for participation in protected conduct.

Because the unfair practice charge and the complaint do not set out an allegation of discrimination, this issue can be considered only if it meets the PERB requirements described in Tahoe-Truckee for consideration of an unalleged violation. Both the Union and the District fully litigated the question of how Ms. Gatto came to be separated from the leadership team. Both the Union and the District presented witnesses who testified about this subject and both sides had the opportunity to cross-examine witnesses about their testimony on this issue. In their briefs, the parties have addressed the question of whether Ms. Gatto was dismissed from the leadership team or voluntarily quit. I conclude, therefore, that the requirements for considering an unalleged violation have been met.

Under section 3543.5(a), it is unlawful for a public school employer to "[i]mpose . . . reprisals on employees, to discriminate . . . or otherwise to interfere with, restrain, or coerce employees because of their exercise of [protected] rights." In order to prove an allegation of discrimination, the charging party must first demonstrate that the aggrieved employee engaged in protected conduct. The charging party must next show that the employer knew of the employee's protected act[10] and that the employer took an adverse action against the employee. The adverse action cannot be speculative but must be an actual harm.[11]

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210, unlawful motivation within the

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[10]Moreland Elementary School District (1982) PERB Decision No. 227.

[11]Palo Verde Unified School District (1988) PERB Decision No. 689.

meaning of section 3543.5(a) occurs where the employer's action against the employee was motivated by the employee's participation in protected conduct.[12]

This test, applied by the Board in all discrimination cases since Novato, is consistent with other California and federal precedent. Under both state and federal cases, the trier of fact is required to weigh both direct and circumstantial evidence to determine whether an action would not have been taken against an employee but for the exercise of protected rights.[13] After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the action against the employee "would have occurred in any event." (Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721at 730 [175 Cal.Rptr. 626].) If an employer respondent then shows misconduct on the part of the employee, the employer's action against the employee,

> . . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. [Ibid.]

As noted above, Ms. Gatto participated in protected conduct by attending the Union meeting on September 28, 2000. It is clear that Mr. Dimaano knew of her protected activity.

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[12]Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Other indications of unlawful motivation have been found in an employer's failure to follow usual procedures (Ibid.); shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of a union adherent (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); timing of the action (North Sacramento School District (1982) PERB Decision No. 264); and pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

[13]See Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced, in relevant part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].

He called to speak to her in the classroom where the meeting was taking place. He then asked her questions about the meeting.

Following her refusal to answer Mr. Dimaano's question, Ms. Gatto was removed from the leadership team. Whether removal from the leadership team constitutes an adverse action as required in Board decisions must be measured against an objective standard. "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (Newark Unified School District (1991) PERB Decision No. 864 (Newark).)

Effect on pay and benefits is not the only determiner. In Woodland Joint Unified School District (1990) PERB Decision No. 808, the Board rejected an employer's argument that an employee had suffered no harm when it required her to obtain a doctor's excuse for four consecutive days of absence. The Board observed:

> The District's argument is without merit. Discriminatory enforcement of a work rule for the purpose of harassing or intimidating an employee in retaliation for having engaged in protected activity constitutes adverse action. [Citations.] Thus, [the employee] suffered injury in that the medical verification was imposed to harass and intimidate her for having filed and appealed a grievance. [Fns. omitted.]

Ms. Gatto served on the leadership team with parents and classified employees and had the opportunity to influence policy at the school. She had spent two hours a week on team activities and obviously was proud of her service. She described her participation on the leadership team as "obviously something that's quite worth while." Service on the leadership team was considered a prestigious assignment at Walton Middle School. Under the circumstances here, where a prestigious assignment was removed from an employee because the principal disapproved of her refusal to answer a question, a reasonable employee might

well "consider the action to have an adverse impact on the employee's employment." (Newark.) Such an obvious expression of disfavor by the principal is inherently job threatening.

Finally, I find ample evidence of unlawful motivation. Mr. Dimaano adopted Ms. Nickelberry's warning that new teachers should not participate in a Union meeting. Warning employees not to participate in protected conduct is plainly anti-union activity. Mr. Dimaano then questioned Ms. Gatto about the meeting of teachers, implying by his conduct something improper about teachers attending a Union meeting. These acts, by their very nature, bespeak of animus toward employee participation in the activities of an employee organization.

That leaves only the question of whether Ms. Gatto would have been removed from her position on the leadership team regardless of her participation in protected conduct. Plainly she would not have been. Mr. Dimaano made it explicitly clear that she was being removed from the leadership team because she would not answer his question about the meeting. She would not disclose the identity of co-workers who, like herself, were engaged in protected conduct. It is clear, therefore, that but for her participation in protected conduct, Ms. Gatto would not have been required to relinquish this assignment.

I conclude, therefore, that the District retaliated against Ms. Gatto by removing her from participation in the leadership team. This action was discriminatory and in violation of section 3543.5(a). Because Mr. Dimaano's retaliatory removal of Ms. Gatto from the leadership team would have the natural effect of discouraging her from participating in the activities of the Union, this action also interfered with the ability of the Union to represent its members. When employees are intimidated not to participate in Union activities, the collective

strength of the Union is weakened, thereby interfering with its ability to represent its members. For this reason, I find also that Mr. Dimaano's conduct violated section 3543.5(b).

REMEDY

The PERB in section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reimbursement of employees with or without back pay, as will effectuate the policies of this chapter.

Here, the District interfered with employee rights to form, join and participate in the activities of an employee organization for the purpose of representation. The District also has retaliated against an employee because of her participation in protected activity. The appropriate remedy for the interference case is an order that the District cease and desist from such interference. The appropriate remedy for the retaliation is to undo the effect of the retaliation by returning the affected employee to the status quo. Therefore, if Ms. Gatto wishes to be reinstated as a member of the leadership team, the District must afford her that opportunity.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Compton Unified School District (District) violated Government Code section 3543.5(a) and (b), provisions of the Educational Employment Relations Act (Act). The District violated the Act by interfering with the right of employees to form, join and participate in the activities of employee organizations and by retaliating against an employee who participated in protected activities. The District interfered with employee rights when on September 28, 2000, Alphonso Dimaano, principal of Walton Middle School, ratified a threat made by Stacey Nickelberry against new teachers attending a meeting of the Compton Education Association (Union). The District interfered with the rights of teacher Gina Gatto when on that date Mr. Dimaano called her to his office and questioned her about the Union meeting. The District then retaliated against Ms. Gatto when on the same date, Mr. Dimaano removed her from the Walton Middle School leadership team because she would not answer his question.

Because the threat, interrogation and retaliation would have the natural effect of discouraging employee participation in the Union, the threats had the further effect of interfering with the right of the Union to represent its members, a violation of section 3543.5(b).

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening new teachers and warning them to leave meetings of the Union.

2. Asking teachers to reveal the identity of the person or persons who called a Union meeting.

3. Retaliating against any teacher who refuses to answer any question about the identity of the person or persons who called a Union meeting.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, offer teacher Gina Gatto an opportunity to resume her service on the Walton Middle School leadership team and reinstate her to the leadership team if she desires it.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

_____
Ronald E. Blubaugh
Administrative Law Judge